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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SALMAN ROSENMANN, Plaintiff and Respondent, v. SHERRI STRAIN, et al., Defendants and Appellants.	B289038 (Los Angeles County Super. Ct. No. BC 523291)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

Scott A. Meehan for Defendants and Appellants.

Spertus, Landes & Umhofer, James W. Spertus, and Ezra D. Landes for Plaintiff and Respondent.

Plaintiff and respondent Salman Rosenmann loaned $300,000 to defendant and appellant Breakout Worldwide Entertainment, Inc. (Breakout) to finance the production of a motion picture. Defendant and appellant Sherri Strain, a co-owner of Breakout, personally guaranteed the loan. Breakout eventually was unable to make payments on the loan, leaving a balance of $280,000 outstanding. Daniel Skura, who is Rosenmann's brother and a co-owner of Breakout, paid Rosenmann $280,000 on the condition that Rosenmann repay him any amount Rosenmann could recover from Strain. Rosenmann then filed suit against Breakout and Strain for $280,000. After a bench trial, the trial court issued a judgment in favor of Rosenmann. Strain and Breakout contend that the trial court erred by allowing Rosenmann to recover damages after Skura had already reimbursed him. We affirm.

FACTS AND PROCEEDINGS BELOW

The main antagonists in this case, Strain and Rosenmann, became connected through their mutual acquaintance with Skura. Skura and Strain each own 50 percent of Breakout, a film production company. Breakout produced five films, with Skura providing the capital and Strain the labor. Skura told Strain that he did not have the money to finance the company's sixth film, but that his brother Rosenmann would provide a loan.

In addition to their blood relationship, Skura and Rosenmann do business together. They jointly owned Skura Intercontinental Trading Company (SITC), a now-dissolved corporation. Skura asked Rosenmann to loan Breakout $300,000 for its next film, and Rosenmann agreed because Skura "spoke good" for Strain, or vouched for her. Skura did not tell Rosenmann that he would formally guarantee the loan, but he made it clear to Rosenmann that he would make up any shortfall in payment.

In February 2009, Skura drew up an agreement under which Rosenmann agreed to loan Breakout $300,000 at an interest rate of 8 percent per year. Skura himself signed the $300,000 check to Breakout, which was drawn from a bank account owned by SITC, a company whose majority owner was Skura. Under the agreement, Breakout agreed to make interest-only payments of $2,000 per month for one year, and then to pay 10 monthly installments of $30,000 plus interest from April 2010 to January 2011. Strain signed the agreement both on behalf of Breakout and as a personal guarantor. Skura did not sign the loan agreement, and Strain does not claim that Skura told her at the time that he would guarantee the loan. Strain gave Rosenmann post-dated checks to cover all the payments.

Rosenmann deposited the interest-only checks without issue. But the film financed with Rosenmann's loan lost money, and Strain told Skura that Breakout did not have the funds to make the scheduled principal payments. Skura relayed this information to Rosenmann and drafted a modification to the payment schedule to reduce the monthly payments. Under the new contract, which Strain again signed both on behalf of Breakout and as a personal guarantor, Breakout agreed to pay $2,000 immediately, followed by 10 monthly payments of $10,000 plus interest, followed by a final payment of $201,333.33.

Rosenmann deposited two post-dated checks under the new payment schedule, reducing the amount outstanding to $280,000, but when the third payment came due in July 2010, Strain again informed Rosenmann that Breakout did not have sufficient funds. Breakout continued making monthly interest payments through April 2013, but it paid nothing further to reduce the principal on the loan.

After the April 2013 payment, Strain told Skura that she could no longer afford to continue making even the interest payments. Because he had vouched for Strain, Skura took responsibility for repaying the amount outstanding to Rosenmann. On June 4, 2013, Skura signed a document stating that he would repay Rosenmann the remaining $280,000 balance on the loan over the course of two years, plus interest calculated at Rosenmann's bank interest rate. Skura paid Rosenmann back as promised. According to Rosenmann, the brothers had an understanding that Rosenmann would sue Strain and would pay Skura any money he recovered from the lawsuit.

Rosenmann filed the operative second amended complaint on September 9, 2015 against Strain and Breakout, alleging causes of action for breach of contract, open book account, account stated, unjust enrichment, and constructive trust. After a bench trial, the trial court found Strain and Breakout liable for breach of contract, as well as open book account, account stated, and unjust enrichment. The court awarded Rosenmann $386,292.61 in unpaid principal and interest.

DISCUSSION

Defendants contend that the trial court erred by awarding damages to Rosenmann because, they argue, Rosenmann suffered no damages. According to defendants, when Skura paid Rosenmann the amount Breakout owed, this ended the debt and relieved Breakout and Strain from any obligation to pay. In defendants' view, the trial court's judgment essentially allows Rosenmann to obtain a double recovery. We disagree. As the trial court correctly explained, the payment from Skura to Rosenmann was to satisfy a moral obligation, not a legal one, and it was not intended for the benefit of defendants. To reverse the trial court would be to punish Skura for acting voluntarily to protect his brother while relieving Strain of the legal obligation she assumed when she agreed to guarantee the loan.

Defendants are correct that "[a] breach of contract is not actionable without damage." (*Bramalea California, Inc. v. Reliable Interiors, Inc.* (2004) 119 Cal.App.4th 468, 473 (*Bramalea*); accord, *Patent Scaffolding Co. v. William Simpson Const. Co.* (1967) 256 Cal.App.2d 506, 511 (*Patent Scaffolding*).) But that is not the issue here—Rosenmann did suffer damages when Breakout failed to pay the amount owed under the contract. The relevant question is whether the payment by Skura, who vouched for Strain but who did not sign a personal guarantee of the loan, constituted a recovery for Rosenmann and absolved Breakout and Strain's obligations.

Defendants argue that the answer to that question is yes, noting that under Civil Code section 1473, "[f]ull performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it." (Civ. Code, § 1473.) But as Rosenmann points out, Skura did not make the payment "on . . . behalf" of defendants. To act on behalf of someone is to act “as the agent [or] representative of” that person. (Garner, Dict. of Legal Usage (3d ed. 2011) p. 106.) Although Skura was a part-owner of Breakout, he did not act as its representative when paying Rosenmann. Instead, Rosenmann testified that Skura paid him with the understanding that Rosenmann would sue defendants and pass any recovery on to him.

Nor did the trial court’s ruling provide Strain with an impermissible double recovery under *Bramalea*, *supra*, 119 Cal.App.4th 468, as defendants also contend. In *Bramalea*, a group of homeowners sued a real estate developer for construction defects. The developer in turn filed a cross-complaint against its subcontractors. (*Id.* at p. 470.) At the outset of the case, the developer’s insurer paid for the attorneys who represented the developer. The developer’s contracts with its subcontractors required the subcontractors also to maintain insurance and to reimburse the developer for its attorney fees, but the developer delayed more than a year before informing the subcontractors’ insurance carriers about the suit. At that point the subcontractors’ insurers assumed and began paying for the defense of the case. (*Id.* at pp. 470-471.) After the case settled, the developer sought to recover attorney fees from the subcontractors’ insurers for the period before the developer notified the subcontractors’ insurers about the case. (*Ibid.*) The court held that the developer could not obtain attorney fees on its own behalf because its insurer had already paid for the attorney fees. To award any further damages would allow the developer an impermissible double recovery. (*Bramalea*, *supra*, 119 Cal.App.4th at p. 472.)

The difference between *Bramalea* and this case is that the insurer in *Bramalea* was legally obligated to cover the developer’s defense. (See *Bramalea*, *supra*, 119 Cal.App.4th at p. 475.)

Indeed, the insurer had " 'accepted premiums to cover the very loss which occurred.' " (*Id.* at pp. 474-475, quoting *Patent Scaffolding*, *supra*, 256 Cal.App.2d at p. 516.) Once a policyholder has received a recovery for a loss from an insurer, he may not obtain a second recovery on his own behalf, and courts allow the insurer to subrogate to its client's claims and pursue them only in certain circumstances. (See *Bramalea*, *supra*, 119 Cal.App.4th at pp. 474-475.) Because the insurer voluntarily assumes certain risks for the benefit of its policyholders and is compensated for doing so, it would be inequitable to allow the insurer to recover damages for a policyholder's loss from another party unless that party proximately caused the loss in question. (See *Patent Scaffolding*, *supra*, 256 Cal.App.2d at pp. 512-513.)

In this case the equities are quite different. Skura did not receive payment to assume a risk as an insurer, nor did he sign the loan agreement as a surety. It is not at all clear that he would have standing to attempt to recover from Breakout on his own behalf or from Strain as a co-guarantor. Nor did Strain have reason to expect she could rely on Skura to pay any part of the loan. The loan agreement was unequivocal in making Strain the sole guarantor of the loan, and Strain did not claim she believed otherwise at the time she signed it. Skura "spoke good" to his brother on behalf of Strain and her ability to repay the loan, but the trial court reasonably concluded that this created "no more than a moral obligation . . . to make good on potentially a bad loan." Strain may not use Skura's voluntary decision to protect his brother from loss as a way to escape her own legal liability as guarantor of the loan.

Because Skura was not legally obligated to guarantee the loan, and did not intend by his payment to exonerate either Breakout or Strain, the payment does not constitute a recovery by Rosenmann. The trial court's award therefore did not give Rosenmann an impermissible double recovery.

Defendants' remaining arguments fail for similar reasons. Strain contends that her obligation as a guarantor was relieved under Civil Code section 2839, which provides that "[p]erformance of the principal obligation, or an offer of such performance, duly made as provided in this code, exonerates a surety." But as we have already seen, Skura's payment to Rosenmann was not the performance of the principal obligation in the loan agreement. And because Skura did not pay for the purpose of satisfying Breakout's obligation, Rosenmann's acceptance of his payment does not reduce or eliminate Strain's obligation as surety under Civil Code section 2822, subdivision (a). Finally, because Rosenmann was entitled to recover the full amount of damages for breach of contract alone, defendants' challenges to the causes of action for unjust enrichment, account stated, and open book account are irrelevant.

DISPOSITION

The judgment of the trial court is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LEIS, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.